20 CHILD WELFARE CASES EVERYONE SHOULD KNOW

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Goals

- Cover major cases.
- Cover key subject areas.
- Provide easy-to-use reference materials.
- Encourage citation to law and preservation of issues.
- Disclaimer: this is not exhaustive, and you may disagree with some of my selections.

In re Sanders (Individual Adjudication)

- 495 Mich. 394, 852 N.W.2d 524 (2014)
- The case that ended the one parent doctrine.
- Due process requires adjudication of a parent before a court can exercise its dispositional authority regarding that parent.
  - *Stanley v. Illinois,* 405 U.S. 645 (1972)
- In this case, on basis of mother's plea, father given supervised visits, required to follow a service plan, and stripped of his right to have placement or arrange for placement of kids.

Sanders continued

- Decision notes that a parent's right to direct the care, custody, and control of his or her child free from state interference is a core liberty interest protected by the 14th Amendment. Cites numerous cases:
  - *Stanley v. Illinois*, 405 U.S. 645 (1972)
  - *Smith v. OFFER*, 431 U.S. 816 (1977)
  - *Santosky v. Kramer*, 455 U.S. 745 (1982)
  - *Troxel v. Granville,* 530 U.S. 57 (2000)
  - *In re Brock*, 442 Mich. 101 (1993)
  - *In re JK,* 468 Mich. 202 (2003)
- Due process demands procedural protections before the state can infringe a fundamental right.

In re Dearmon (Evid. at Adjudication)

- 303 Mich. App. 684, 847 N.W.2d 514 (2014)
- Evidence obtained after a petition has been filed may be presented at adjudication if relevant to allegations in petition and respondent has notice of evidence.
- In this case, petitioner claimed that respondent would not extricate herself from a violent relationship that endangered the children.
- Respondent claimed no voluntary contact w/ abuser.
- Jailhouse telephone audiotapes obtained after the petition was filed were introduced as evidence of respondent's intent to maintain relationship with abusive partner.

In re Brock (Cross-Exam & Privilege)

- 442 Mich. 101, 499 N.W.2d 752 (1993)
- Alternative questioning methods, such as an impartial examiner and video deposition, are allowed if regular questioning found likely to be harmful to child witness.
  - See MCL 712A.17b(13) and MCR 3.923(F)
- The right to cross-examination is not absolute.
  - No 6th Amendment right to confrontation, because not criminal.
  - Both sides can submit questions, but examiner need not ask all of them or follow their wording exactly.
  - Court reasoned that traumatizing witness likely to result in poorer truth-seeking, thwarting the goals of cross-examination.
- Also, relevant info that would otherwise be privileged is admissible in a child protection proceeding.

In re Jacobs (Culpability)

- 433 Mich. 24, 444 N.W.2d 789 (1989)
- Culpability need not be shown to support jurisdiction due to neglect.
  - 712A.2(b)(1) includes neglect as a verb and notes that the parent must be “able to” provide care. The Court interpreted this as a culpability requirement.
  - 712A.2(b)(2) includes neglect as a noun and includes no culpability.
- Mother had a stroke and could not provide care and housing for the children.
- Father also unable to care for the children.

In re Rood (Notice & Rsbl Efforts)

- 483 Mich. 73, 763 N.W.2d 587 (2009)
- Court first discussed the constitutionally-protected liberty interests of parents in the care, custody, and management of their children.
  - Cited *Reist v. Bay Co. Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (1976), which is also interesting for its statement that children and parents both have fundamental rights to "mutual support and society," a rare statement of children's constitutional rights.
- Right to notice and to be heard violated in this case by notice errors of agency and court.
  - Court and agency had correct phone number and mailing address, but there were numerous mailings to wrong address; little attempt to contact; when attempts made, often to wrong number.

Rood continued

- Service plan not provided for father.
- Many agency policies not followed about working with parents to develop service plan, finding out if relatives available, implementing a service plan designed to address problems in the case, and parenting time.
- Court stressed centrality of service plan to the reasonable efforts requirement.
  - States RE required in *all cases* unless aggravated circumstances.
- Parents must have notice of proceedings, an opportunity to be heard, and an opportunity to participate in the case, including services.

In re Mason (Incarc. Parents & RE)

- 486 Mich. 142, 782 N.W.2d 747 (2010)
- Incarcerated parents must have an opportunity to participate in proceedings and reunification process. Reasonable efforts required unless aggravated circ.
  - Court appearance may be by phone. MCR 2.004 (MDOC custody).
- Incarceration alone is not a sufficient reason for TPR.
  - MCL 712A.19b(3)(h) includes three conditions.
  - Criminal history alone also does not justify TPR. Only aggravated circumstances excuse reasonable efforts.
- If child placed with relative, court must consider that as part of best interest determination for TPR.
- A failure to make reasonable efforts creates “a hole in the evidence,” rendering TPR premature.

In re H.R.C. (In Camera and RE Limit)

- 286 Mich. App. 444, 781 N.W.2d 105 (2009)
- Courts may not conduct in camera interviews of children in child protection proceedings.
  - Allowed in child custody cases to determine child's parental preference as part of best interest considerations.
- Reasonable efforts not required if TPR is agency's goal.
  - Conflicts with *Mason* and *Rood,* which held that RE required unless aggravated circumstances.
  - *H.R.C.* is actually an aggravated circumstances case, so court's statement was unnecessary to the holding and should be construed as dicta. Yet COA has followed this rule time and again.

In re Newman (Opportunity to Rectify)

- 189 Mich. App. 61, 472 N.W.2d 38 (1991)
- Agency must give respondents a full and fair opportunity to address identified problems.
  - In this case, homemaker assigned to assist with cleaning the home dropped off cleaning supplies and left because the house was dirty.
- Agency cannot prove that conditions would not be rectified in a reasonable time, or that proper care and custody are unlikely to be provided in a reasonable time, if it does not give appropriate services to address the identified problems.

In re JK (Treatmt Compliance & Adoption)

- 468 Mich. 202, 661 N.W.2d 216 (2003)
- Compliance with a parent-agency treatment plan is evidence of ability to provide proper care and custody.
  - Agency must create a plan that is adequate to address its concerns. Failure to do so is the agency's problem, not the respondent's.
- Courts mustn't compare foster homes and parental homes when deciding statutory grounds.
- No adoption can be ordered if TPR appeal pending.
- *In re Gazella*, 264 Mich. App. 668, 692 N.W.2d 708 (2005) clarified: compliance *and benefit* required.

In re Hicks/Brown (Disability)

- 893 N.W.2d 637 (Mich. 2017)
- Agency services must accommodate disability pursuant to Americans with Disabilities Act if agency aware or should be aware of disability.
- If reasonable accommodations are not made, then no reasonable efforts, and TPR is improper.
- Old rule about timeliness of request for accommodations cast into serious doubt. Court dismissed it as dicta from COA case (*In re Terry*, 240 Mich. App. 14 [2000]).
  - Old rule was that request must be made when initial service plan adopted or shortly thereafter.
  - New rule appears to be that there needs to be time to effectuate the accommodations. But agency cannot sandbag.

In re JL (Active Efforts under ICWA)

- 483 Mich. 300, 770 N.W.2d 853 (2009)
- ICWA case: active efforts required.
- Active efforts need not be current or related to the child presently in question, but need to have been recent and relevant to the problems currently identified.
  - Court rejected futility test.
  - Active efforts involve affirmative steps, active involvement of agency workers in implementation rather than merely giving a list of services.
  - Active efforts must be culturally appropriate.
  - Active efforts must permit a current assessment.
- In this case, respondent received extensive services in recent termination cases w/ similar circumstances.

In re Morris (ICWA Notice & Remedy)

- 491 Mich. 81, 815 N.W.2d 62 (2012)
- Offers a thorough overview of ICWA requirements, including eligibility, notice, jurisdiction, tribal right to intervene, standards of proof, and placement preferences.
- If the court receives information about any criteria on which tribal membership can be based, notice to tribe is required (and to Sec. of Interior [BIA] if tribe unknown).
  - File the notice and return receipt or proof of service with court.
  - Parents cannot waive notice requirement or child's membership, because that would waive tribe's rights.
- Remedy for notice violations is "conditional reversal."
  - Remand to comply with notice provision. If child eligible, reverse and pursue ICWA-compliant proceedings. If not, case proceeds.

In re Moss (Best Interests: Std. of Proof)

- 301 Mich. App. 76, 836 N.W.2d 182 (2013)
- The best interests determination in TPR decisions uses the preponderance of the evidence standard, not clear and convincing evidence standard.
  - Differs from decision about statutory grounds for TPR.
- Court engaged in a due process analysis.
  - At statutory ground stage, parent and child share a vital interest in preventing erroneous termination.
  - At best interests stage, parental unfitness has been proven, and child's interest in safety aligns with the state's interest.
    - No need for heightened standard of proof. If heightened standard of proof, an error is more likely to keep child with unfit parent.
  - Focus at best interests stage is on the child, not the parent.

In re White (Best Interests: Findings)

- 303 Mich. App. 701, 846 N.W.2d 61 (2014)
- Clarified *In re Olive/Metts*, 297 Mich. App. 35 (2012), which held that each child requires an individual best interests analysis at TPR.
- If best interests of individual children differ significantly, the court should address those differences in determining best interests. But no need for redundant findings.
- For best interests, court should consider parent-child bond, parent's parenting ability, child's need for permanency, stability, and finality, advantages of foster home over the parent's home, domestic violence history, compliance with service plan, visit history, child's well-being in foster care, possibility of adoption.

In re A.P. (Custody & Child Welfare)

- 283 Mich. App. 574, 770 N.W.2d 403 (2009)
- Notes that child has due process liberty interest in family life. A right to proper and necessary support, education, and care. In other words, a right to a fit parent.
- Existing custody order goes dormant during juvenile proceeding. Effective again when juvenile case dismissed.
- Juvenile court orders supersede custody orders. They don't modify or terminate them.

In re A.P. continued

- Judges presiding over juvenile cases can hear custody matters.
- Custody matter must have its own case number, and custody orders cannot be folded into juvenile orders.
- Dual caption pleadings
- All Child Custody Act procedures must be followed, including determination of established custodial environment and best interest analysis under MCL 722.23.

In re M.U. (Criminality)

- 264 Mich. App. 270, 690 N.W.2d 495 (2005)
- Proving "criminality" under MCL 712A.2(b)(2) does not require conviction.
  - If legislature intended to require proof of conviction, it would have said so, as it did in MCL 712A.19b(3)(n).
- Allowing evidence of criminality in juvenile case does not violate respondent's due process in criminal case.
- Choice not to testify due to danger of self-incrimination may result in an adverse inference in the child protection matter.
- Respondent was lone suspect in murder of child's mother. Trial court should have allowed evidence about his involvement in that crime.

In re Blakeman (Self-Incrimination)

- COA Docket Number 341826 (2018)
- Father found responsible for fracturing skull of unrelated toddler, ordered out of home. No contact allowed with his kids. Later allowed supervised visits.
  - Respondent said he did not hurt the child.
- Trial court conditioned return to home and relaxation of visit conditions on father admitting responsibility for the skull fracture.
  - DHHS and father's therapist said he should be reunited with this family.
- COA said that requiring father to incriminate himself in order to be reunified with family violated 5th Am. rights.

In re LaFrance (Anticipatory Neglect)

- 306 Mich. App. 713, 858 N.W.2d 143 (2014)
- Jurisdiction was based on father's failure to recognize infant's serious illness and get treatment. Trial court ordered TPR regarding infant and three older children.
  - No allegations of maltreatment of the older kids.
- Trial court relied on anticipatory neglect (treatment of one child is probative of how a parent may treat other children) to extend its reasoning about the infant to three older kids.
  - *Matter of LeFlure*, 48 Mich. App. 377, 210 N.W.2d 482 (1973)

LaFrance continued

- COA rejected trial court's reasoning.
- Dissimilar circumstances of older kids and infant.
- Need greater showing of risk or harm. Anticipatory neglect not sufficient when kids' situations so dissimilar. Too speculative.
- Also limited application of MCL 712A.19b(3)(b)(ii) to failure to prevent *intentional* actions.
  - Parent w/ opportunity to prevent injury or abuse failed to do so and there is reasonable likelihood of further injury if placed in home.

In re K.H. (Putative Fathers)

- 469 Mich. 621, 677 N.W.2d 800 (2004)
- A putative father cannot be a respondent in a child protection case (unless he fits the definition of "nonparent adult").
  - Must establish legal paternity first.
  - Deal with putative fathers under MCR 3.921(D), which provides procedures for notice, hearing, and declaring that no father can be identified and no further notice is needed.
- Also worth noting in this context
  - "Parent" and "father" are terms of art defined in MCR 3.903(A), and a putative father fits neither definition.
  - "Respondent" is defined in MCR 3.903(C) and 3.977(B), and neither definition encompasses putative fathers.

In re Yarbrough (Funding for Experts)

- 314 Mich. App. 111, 885 N.W.2d 878 (2016)
- Courts must give respondents reasonable funds for expert consultation if there's a nexus between the respondents' request and the issues presented and there is a reasonable probability that an expert would be of meaningful assistance.
- Seriously ill infant ended up comatose.
- Radiologists at one hospital found no sign of trauma on MRI and CT of brain.
- Radiologists at another read same scans and found signs of prior trauma.
- TPR petition filed. Parents moved for funds for expert given conflict between doctors. Trial court denied. TPR.

Yarbrough continued

- Here, petitioner's case rested entirely on expert testimony.
- *Mathews v. Eldridge*, 424 U.S. 319 (1976), analysis of DP.
  - Private interest of parents here is commanding. And state even shares parents' interest in an accurate and just decision.
  - Risk of error is very high if parents are not allowed funds for expert given complexity of evidence.
  - Government's interest in saving money is not substantial enough given the stakes to deny these funds to parents.
- Again, conflict between doctors about complex evidence made expert witness funds necessary. Not always the case. Must use *Mathews v. Eldridge* analysis because "due process is flexible and calls for such procedural protections as the particular situation demands."